IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 13, 2009 Session

DONNA MARIE RICHMOND, ET AL. v. JEAN FRAZIER

Appeal from the Chancery Court for Hawkins County
No. 16455 Tom Wright, Judge[1]

No. E2008-01132-COA-R3-CV - FILED AUGUST 4, 2009

This appeal concerns the termination of a lease and the subsequent initiation of a detainer action. Donna Marie Richmond, Harry Richmond, II, and Rebecca R. White[2] ("Lessors") alleged that the lessee, Jean Frazier ("Ms. Frazier"), defaulted on the Church Hill Lease ("Lease") as a result of the deteriorating condition of the Church Hill Shopping Center. When Ms. Frazier refused to relinquish the premises after termination of the Lease, Lessors filed the detainer action to reclaim the property. After a trial, the Chancery Court held that Ms. Frazier did not break the Lease because of the prior course of conduct of the parties and that Ms. Frazier took reasonable care of the premises. Based on the plain language of the Lease agreement and the factual findings of the trial court, we reverse.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed; Case Remanded

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., and D. MICHAEL SWINEY, JJ. joined.

John W. Cleveland, Sweetwater, Tennessee, for Appellants, Donna Marie Richmond, Harry Richmond, II, and Rebecca R. White.

Thomas A. Peters, Kingsport, Tennessee, for Appellee, Jean Frazier.

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[1] Judge Wright, the Presiding Circuit Judge for the Third Judicial District, heard this matter by interchange.

[2] Ms. White has since remarried and taken the name Whitaker. For consistency in the factual record, we will continue to refer to her as Ms. White.

OPINION

I.

FACTUAL BACKGROUND

Lessors hold title as tenants in common to the Church Hill Shopping Center ("Church Hill"), which consists of about 10 acres along U.S. Highway 11W. On November 2, 1969, Carl Frazier and his wife, Ms. Frazier, entered into the Lease with owners of Church Hill, Harry E. Richmond (now deceased) and his wife, Donna Marie Richmond. Harry Richmond, II, and Rebecca R. White are the children of Harry and Donna Marie Richmond. Carl Frazier developed Church Hill in the 1970's and managed it until his death in 1994. Since then, the property has been managed by his widow, Ms. Frazier.

The Lease provides, in pertinent part,

II. MUTUAL COVENANTS:

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f. No consent, expressed or implied, by the Lessors to any breach of any of the covenants herein to be performed by the Lessees shall be deemed to be a waiver of any succeeding breach of the same.

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j. In the event of default being made in the performance of the covenants and agreements...in this lease on the part of the Lessees to be performed by them as herein provided, . . . the Lessors may, ***after giving Lessees sixty (60) days written notice of such defaults*** or such non-compliance, at their option, ***terminate this lease without further notice***, if after the said sixty (60) days notice, Lessees still remain in default or fail to comply with said statutes, ordinances, rules and requirements.

III. LESSEES' COVENANTS:

The Lessees for themselves, their Legal Representatives and successors and assigns do hereby covenant with the Lessors, their heirs, executors, administrators and assigns:

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c. That they will take ***reasonable care*** of the premises and be responsible for all damages or every kind and character thereto, ***except ordinary wear and tear***; and upon termination of the lease by forfeiture, abandonment, cancellation, termination,

> or otherwise, Lessees agree to deliver up the premises to Lessors in a reasonably good condition, ordinary wear and tear excepted.
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> ***
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> f. ***The Lessees shall keep all buildings and other structures which may be erected upon the premises at any time during the term of this lease in good condition and repair.***
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> g. The Lessees shall indemnify the Lessors against all costs and expenses including attorney's fees, lawfully and reasonably incurred by Lessors in or about the premises, or in the defense of any action or proceeding, or in discharging the premises from any charge, lien, or encumbrance or in obtaining possession after default of Lessees on the termination of this lease. . . .
>
> h. The Lessees shall keep the buildings and improvements upon the premises insured against loss or damage by fire or other casualty for their full insurable value with types of coverage satisfactory to Lessors, and with a nationally recognized company or companies authorized to do business in Tennessee. Lessees shall furnish to Lessors a complete list of all such insurance, shall pay all the premiums necessary for those purposes immediately as they become due, and deliver to the Lessors the receipts therefor; shall make all insurance payable to the Lessors as their interests may appear; . . .

(Emphasis added).

On January 18, 2007, Ms. Frazier received a "Notice to Maintain Shopping Center" from Lessors ("Notice"). The Notice specifically focused on the Lease requirement that all buildings and other structures erected on the premises during the Lease had to be kept in good condition and repair. The Notice contained an itemized list of buildings and structures that were allegedly in poor condition and needed to be repaired. These included:

> NEW BUILDING (Genesis Books & Gifts, Patsy's Bakery & Deli, Wayne's Barbering & Styling, Video Reel, and Touch of Tropic Tanning & Nail Salon)
>
> 1. The concrete block screen for trash receptacles is broken.
> 2. The gutter is leaking badly at the second downspout from the west end of the building.
> 3. The door under the leaking downspout needs to be replaced.
> 4. The empty marque box needs to be repaired or removed.
> 5. The mold and/or mildew needs to be washed from all rough block.
> 6. The facade needs to be replaced at the southeast corner in front of Genesis Books.
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> ABANDONED CITGO STATION / CHEROKEE FOOD STORE
> 7. The abandoned station must be demolished, the entire site cleaned up and

repaved.
8. The canopy and columns must be removed, holes filled and area repaved.

ABANDONED CAR WASH
9. The abandoned carwash must be demolished and the site cleaned up.

FAMILY DOLLAR STORE SIGN
10. The signpost must be blasted and repainted.

PARKING LOT
11. There are at least two large potholes and a lot of standing water in the drainage line of the front parking lot parallel to the creek that must be repaired and re-graded to drain standing water.
12. The huge potholes in the parking lot behind and beside Homestead Antiques must be filled.
13. The pothole at the west end of the building outside New Beginning Assembly must be filled.

MAIN BUILDING
14. Water leak from roof above walk in front of Amazing Tans must be repaired.
15. The hole in the wall of the enclosure built on the loading dock at the back of Homestead Antiques, the west end of the building, must be repaired.
16. The missing and damage[d] ceiling tile over the walkways must be replaced.
17. Junk, trash and debris must be moved off loading dock and from around building.
18. Mold, mildew and graffiti must be removed from exterior walls.

RETAINING WALL
19. The collapsed retaining wall on the south side of the property must be removed and replaced.
20. All overgrown vegetation and undergrowth . . . near the retaining wall and around the parking lot behind Homestead Antiques must be removed and trimmed.

The Notice further provided that termination of the Lease would occur without further notice if the above noted violations were not corrected within 60 days.

Although Ms. Frazier provided proof of insurance to Lessors within the 60-day period as required by Section III(h), she did not cure or attempt to cure any of the purported defects. On March 23, 2007, Lessors filed a Notice of Lease Termination in the Office of the Register of Deeds of Hawkins County, Tennessee, and also sent notice to the various tenants of Church Hill about the change. Since Ms. Frazier refused to relinquish the property, Lessors filed this detainer action on April 10, 2007.

Proceedings in the Trial Court

The action was heard on March 17, 2008.[3] During the trial, Lessor Rebecca R. White testified that she grew concerned over the deteriorating condition of Church Hill in late 2006. Specifically, she feared that by the time the Lease expired in 2019, the property would be a liability rather than an asset. She further testified that none of the requested repairs required by the Notice had been made within the 60-day period.

Lessor Donna Marie Richmond testified that she did not remember mentioning anything about the upkeep of Church Hill to Ms. Frazier since the execution of the Lease in 1969. She stated that she visits the shopping center two to three times a week and had not seen any repairs carried out since the Notice. After Ms. Richmond's testimony, the Trial Judge and Circuit Court Clerk visited the property without any of the parties or their counsel present, as previously agreed to by the parties.

Ms. Frazier testified that prior to January 2007, she had never received any comments or complaints from any of the Lessors about the condition of Church Hill. She stated that she does not have a maintenance plan, but instead responds to maintenance requests from tenants on an ad-hoc basis. She explained that the retaining wall behind Oakwood Antiques collapsed shortly after it was built in the 1970's. Ms. Frazier opined that the shopping center is in as good a condition as one could expect from a 30-year-old strip mall. She also introduced into evidence all of her maintenance expenditures from 2007. On cross-examination, Ms. Frazier testified regarding the amount of rent she collected from her subtenants and explained that she had the entire shopping center painted in 2006.

Ruling in the Trial Court

A Final Decree was entered in favor of Ms. Frazier on May 1, 2008.

The trial court determined that no effort to cure the deteriorating conditions on the property had been made within 60 days after Ms. Frazier's receipt of the Notice. Nevertheless, the trial court held that "Defendant has not breached the Lease by failing to respond to Plaintiffs' letter of January, 2007, because the term 'premises' as used in the lease means 'the land,' the leased property is being reasonably maintained and is in reasonably good condition; therefore, Defendant is not in breach of the lease, but is going to have to take some action;. . ." The trial court went on to find that "given the course of conduct between the parties, the defendant Lessee did not breach the covenants of the parties' lease that Lessee take reasonable care of the premises and keep all buildings and other structures on the premises in good condition and repair."

Specifically, the trial court required that the following actions be taken:

[3]Since a stenographer was not present during the trial, this court is relying on the parties Stipulated Statement of the Evidence for descriptions of the witnesses' testimony.

- The vegetation and debris behind Oakwood Antiques must be cleaned up;
- The broken block wall at the back of Oakwood Antiques must be repaired;
- The mold and /or mildew must be removed on the walls of the older shopping center building and on the columns of the newer blue building within 30 days of the May 1, 2008 ruling;
- The pot holes need to be filled or repaired within six months of the ruling;
- The graffiti on the shopping center walls, particularly the back wall of Oakwood Antiques must be cleaned off or repaired;
- The rust must be removed from the Family Dollar sign and it needs to be repainted within 90 days of the ruling;
- Missing ceiling tiles must be replaced in the covered walkway around the older shopping center building within 15 days of the ruling, but the dirty tiles are not unreasonably maintained.

Furthermore, the trial court made the following findings concerning certain items that were not unreasonably maintained:

- The empty sign box on the end of the newer blue building is not unreasonably maintained;
- The missing and/or burned out florescent tubes and/or non-functional ballasts above the covered walkway around the older shopping center building and in the exterior hall within the buildings are not unreasonably maintained;
- The unrepaired dents in the metal veneer on the columns around the old shopping center building caused by vehicle collisions are not unreasonably maintained;
- The old filling station, car wash and un-repaved surface where underground petroleum storage tanks were removed are not unreasonably maintained;
- The failure to replace or repair the retaining wall behind Oakwood Antiques is not unreasonable maintenance of the premises since the wall has been down for thirty years.

Based upon its findings, the trial court dismissed the unlawful detainer action and ordered Ms. Frazier to take actions as listed above.

The Lessors filed a timely appeal.

II.

ISSUE FOR REVIEW

We are only presented with one issue for review: Did the trial court err in failing to enforce the plain and unambiguous covenants and forfeiture clause of the Lease Agreement between the parties?

III.

STANDARD OF REVIEW

Since the case was tried without a jury, the standard of review is *de novo* upon the record. Tenn. R. App. P. 13(d). This court gives a presumption of correctness to the trial court's findings of fact and will disturb those findings only where the preponderance of the evidence is otherwise. R*awlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001). If the trial judge has failed to make specific findings of fact, this Court will review the record to determine where the preponderance of evidence lies. *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997). However, the trial court's conclusions of law are reviewed *de novo* with no presumption of correctness. *Id.*

IV.

DISCUSSION

Lessors Contention:

Lessors contend that the trial court used an incorrect legal standard in deciding the case. They argue that the trial court incorrectly read the "except ordinary wear and tear" provisions found in III(c) of the Lease into III(f) of the Lease which requires the Lessee to maintain the buildings in "good condition and repair." According to Lessors, the Lessee is not responsible for ordinary wear and tear on the premises in general; however, they assert that III(f) creates an exception that requires the Lessee to maintain the buildings and structures in good condition and repair, irrespective of ordinary wear and tear. In other words, III(f) creates a higher standard for the upkeep of the buildings and structures than the rest of the property. Lessors contend that the Lease language is unambiguous, and that the trial court erred in failing to enforce the plain language of the Lease.

Lessors also analogize the situation to *94th Aero Squadron of Memphis, Inc. v. Memphis-Shelby County Airport Auth.*, 169 S.W.3d 627 (Tenn. Ct. App. 2004), where this Court found that terms of a lease that required the premises be "kept in good order and repair" had been violated. In *94th Aero Squadron*, the record showed that:

> [t]he restaurant and surrounding area were in a state of disrepair. A section of ceiling had collapsed as a result of flooding from a burst pipe. Overgrown grass, weeds, shrubs, and debris covered the grounds. The military aircraft relics located about the premises had been neglected and were missing parts. Security fencing around the facility was not in compliance with FAA and Airport Safety Regulations. The structure had been vandalized, and there was evidence that homeless persons were using the building for shelter. In sum, the premises appeared dilapidated and abandoned.

Id., 169 S.W.3d at 631.

Lessors contend that the present situation is similar to *94th Aero Squadron* in that Church Hill

has fallen into disrepair, parts of the buildings' ceilings have collapsed, the grass is overgrown, debris covers the grounds, the structures are vandalized, and the entire premises appears dilapidated and abandoned. Lessors argue that since these conditions were sufficient to breach the duty to keep the premises in good condition and repair in *94th Aero Squadron*, they should be sufficient to breach the same lease language in the present case.

Because the trial court's findings of fact show that some of the buildings were not in good condition, Lessors argue that this court must find that Ms. Frazier breached the Lease and that the detainer action was appropriate.

Ms. Frazier's response:

Ms. Frazier states that the detainer statute does not apply since the trial court found that, given the course of conduct between the parties, the defendant Lessee did not breach the covenants of the parties' Lease. Ms. Frazier contends that the trial court did not take issue with the terms of the Lease agreement, but instead with the Lessors' definition of "reasonable." Thus, Ms. Frazier's main argument seems to be that the Lease - per section III(c) - only requires her to take reasonable care of the property. She is silent as to the effect of section III(f).

Ms. Frazier distinguishes *94th Aero Squadron* by noting that there was no dispute in that matter that the lessee had failed to perform the covenants in the lease, while in this case such a dispute exists. Furthermore, the premises in *94th Aero Squadron* had essentially been abandoned, while Church Hill continues to be a viable operation that Ms. Frazier continues to maintain.

Lessors reply by emphasizing that the "course of conduct" between the parties is irrelevant since section II(f) of the Lease provides that "No consent, expressed or implied, by the Lessors to any breach of any of the covenants herein to be performed by the Lessees shall be deemed to be a waiver of any succeeding breach of same." Besides waiver, Lessors contend that the other two possible bases for "course of conduct" - estoppel and laches - are inapplicable to this case and were also not raised by Ms. Frazier. Thus, Lessors argue that the trial court erred in making any determination based on "course of conduct."

Lessors further point out Ms. Frazier's failure to discuss section III(f) of the Lease. They argue that the "reasonable" requirement is completely absent from III(f) and has nothing to do with whether the property is in "good condition and repair."

Lessors assert that *94th Aero Squadron* is applicable to this matter since the leases in both cases contain the same requirement to maintain the premises in "good order and repair." Lessors further contend that whether the premises have been abandoned or continue to operate is irrelevant to the requirement to keep the premises in good condition or repair.

V.

ANALYSIS

The Tennessee detainer statute, Tenn. Code Ann. § 29-18-104, creates a right to bring a cause of action for a writ of possession when a lessee remains on the leased property after the lease has been terminated. *Cain P'ship Ltd. v. Pioneer Inv. Servs. Co.*, 914 S.W.2d 452, 456 (Tenn. 1996). In *Cain*, the Tennessee Supreme Court adopted the *Restatement (Second) of Property*, § 13.1 (1977), and quoted the provision as follows:

> Nonperformance of Tenant's Promise - Remedies Available
>
> Except to the extent the parties to a lease validly agree otherwise, if the tenant fails to perform a valid promise contained in the lease to do, or to refrain from doing, something on the leased property or elsewhere, and as a consequence thereof, the landlord is deprived of a significant inducement to the making of the lease, if the tenant does not perform his promise within a reasonable period of time after being requested to do so, the landlord may:
>
> 1) terminate the lease and recover damages; or
> 2) continue the lease and obtain appropriate equitable and legal relief, including
> (a) recovery of damages, and
> (b) recovery of the reasonable cost of performing tenant's promise.

Cain, 914 S.W. 2d at 459.

In short, per Tenn. Code Ann. § 29-18-104 and *Cain*, a landlord may terminate a lease and take possession of the property if the tenant fails to abide by the lease provisions.

The interpretation of lease agreements is governed by traditional rules of contract construction. *Planters Gin Co. v. Fed. Compress & Warehouse Co.*, 78 S.W.3d 885, 889 (Tenn. 2002). The cardinal rule of contract construction is to determine the intent of the parties and to effectuate that intent consistent with applicable legal principles. *Frizzell Constr. Co. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79, 85 (Tenn. 1999). However, "[i]f the language of a written instrument is clear and unambiguous, the court must interpret it as written, rather than according to the unexpressed intention of one of the parties." *Sutton v. First Nat'l Bank of Crossville*, 620 S.W.2d 526, 530 (Tenn. Ct. App. 1981). Additionally:

> The courts should accord contractual terms their natural and ordinary meaning, and should construe them in the context of the entire contract. The courts should also avoid strained constructions that create ambiguities where none exist.
>
> The courts may not make a new contract for parties who have spoken for themselves, and may not relieve parties of their contractual obligations simply because these obligations later prove to be burdensome or unwise.

Realty Shop, Inc. v. RR Westminster Holding, Inc., 7 S.W.3d 581, 597 - 598 (Tenn. Ct. App. 1999) (internal citations excluded).

It is also a well known rule of construction that where general and specific clauses conflict, the specific clause governs the meaning of the contract. 11 Williston on Contracts § 32:10 (4th ed.); *City of Knoxville v. Brown,* 260 S.W.2d 264, 268 (Tenn.1953) (order on petitions to rehear) ("The doctrine of Ejusdem Generis based on the maxim expressio unius est exclusio alterius is: that, where general words are used, followed by a designation of particular things or subject to be included or excluded as the case may be, the inclusion or exclusion will be presumed to be restricted to the particular thing or subject") (quoting Ballentine's Law Dictionary, 2nd ed.); *Magevney v. Karsch*, 65 S.W.2d 562, 571 (Tenn. 1933) ("There is no rule better established with reference to the construction of written instruments than that the exception of particular things from general words shows that the things excepted would have been within the general language, had the exceptions not been made.").

Turning to the case at bar, we agree with the Lessors that the plain language of the Lease clearly contemplates a higher standard of maintenance for the "buildings and other structures" which were erected upon the property during the Lease. There is no question that section III(c) of the Lease only requires that the Lessee take "reasonable care" of the "premises" and that ordinary wear and tear are excepted from this requirement. However, section III(f) unambiguously carves out a specific exception to III(c)'s general requirement. Per III(f), the buildings and structures must be kept in *good* condition and repair. Perhaps most importantly, without a specific provision to the contrary in III(f), the Lessee is also responsible for ordinary wear and tear on the buildings and structures.

As noted above, Lessors try to analogize section III(f)'s requirement to the "good order and repair" requirement found in *94th Aero Squadron*. We are not entirely persuaded by the applicability of that case, largely because of the fact-sensitive nature of the two situations. It is very difficult to get a full sense of the condition of the structure in *94th Aero Squadron* from the opinion alone. Thus, a comparison of this case with *94th Aero Squadron* would be too speculative.

As far as the trial court's findings of fact in this case are concerned, we see nothing in the record that would preponderate against the trial court's determination regarding the condition of the premises, including the buildings and structures. Indeed, this Court is constrained by a cold record and only a few dozen photos of the property, while the trial judge personally viewed the entire premises. Despite our confidence in the trial court's factual findings, we must nevertheless disagree with the trial court's interpretation of the Lease agreement in light of those findings.

We find that the trial court's reliance on "course of conduct" is misplaced. We agree with Lessors that any such argument concerning the course of conduct of the parties is foreclosed by the language in section II(f), which specifically eliminates any possibility of waiver by the Lessors. Furthermore, we think it is inconsistent for the trial court to rule that Ms. Frazier kept the property in "reasonably good condition" while at the same time demanding that a long list of repairs be completed within a set number of days. In our judgment, either the condition of the property lives up to the covenants in the Lease or it does not. The fact that the trial court recognized that certain repairs

needed to be made to the buildings and structures undermines the notion that those buildings and structures were in good condition. While we are aware that the trial court was likely trying to reach an equitable solution between the two parties, it is not allowed to re-write the terms of the Lease.

We reiterate that, per section III(f) of the Lease, the buildings and structures must be kept in good condition and repair *and* that the Lessee is responsible for ordinary wear and tear. Yet the trial court noted the following problems all dealing with either a building or structure: 1) a broken wall at the back of Oakwood Antiques; 2) mold and/or mildew on the walls of the older shopping center building; 3) graffiti on the shopping center walls, and particularly on the back wall of Oakwood Antiques; 4) rust on the Family Dollar Sign; 5) missing ceiling tiles from the covered walkway around the older shopping center; 6) burnt-out florescent tubes in the covered walkway; 7) a broken retaining wall; and 8) dented columns around the old shopping center.

We must conclude that, based on these problems, it is undeniable that Ms. Frazier violated section III(f) of the Lease by failing to keep the buildings and structures in good condition and repair and by failing to redress ordinary wear and tear. Thus, the Lessors were within their rights - per section II(j) - to provide Ms. Frazier with a 60-day notice of default. Since Ms. Frazier took no action within those 60 days, she defaulted on the Lease. She must now relinquish the property to the Lessors.

VI.

CONCLUSION

We hold the trial court erred by failing to enforce the covenants and forfeiture clause of the Lease Agreement between the parties. The judgment of the trial court is reversed and a writ of possession shall be issued upon receipt of this order. Lessors are entitled to their reasonable attorneys' fees, costs, and expenses - at trial and on appeal - pursuant to section III(g) of the Lease. *Edwards v. Carlock Nissan of Jackson, LLC*, No. W2006-01316-COA-R3-CV, 2007 WL 1048952, at *8 (Tenn. Ct. App. W.S., April 9, 2007) (holding Lease provides for the recovery of attorneys' fees and language of Lease does not limit that award to the trial level). The case is remanded to the trial court for enforcement of this court's judgment; to set attorneys' fees, costs, and expenses; and for such further proceedings as may be necessary. Costs on appeal are assessed against the Appellee, Jean Frazier for which execution may issue, if necessary.

JOHN W. McCLARTY, JUDGE